UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CAROLINE O'BAR,	:	
Plaintiff,	:	
	:	
-vs-	:	Civ. No. 3:01cv867 (PCD)
	:	
BOROUGH OF NAUGATUCK, *et al.*,	:	
Defendants.	:	

RULINGS ON MOTIONS FOR SUMMARY JUDGMENT

Defendants move for partial summary judgment.[1] For the reasons set forth herein, the motion is **granted in part**.

I. BACKGROUND

Plaintiff was a police officer for the Borough of Naugatuck from September 6, 1990, until January 27, 2001. The conditions of her employment were governed by a collective bargaining agreement. Plaintiff took maternity leave from on or about March 5, 1999 to June 3, 1999. On her return, she was placed on light duty as recommended by her doctor. Plaintiff was cleared to return to full duty on August 16, 1999, and returned to her original unit. Plaintiff was later selected to teach Drug Abuse Resistance Education (DARE).

The collective bargaining agreement governs performance evaluations and provides for grievance procedures. Plaintiff's October 1, 1999 evaluation reflected that she had taken no sick days. On or about October 21, 1999, the evaluation was changed to reflect fifty-two sick days which

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[1] Individual defendants Dennis Chisham and Thomas Hunt adopted defendant Borough of Naugatuck's motion for summary judgment and are thus collectively referred to as defendants.

corresponded to an unsatisfactory in the attendance category. Plaintiff's overall rating was "satisfactory."

In October 1999, three officers with less seniority were placed on the Community Oriented Policing Service (COPS) Unit. Plaintiff was ultimately placed on the same unit after filing a complaint with the Connecticut Commission on Human Rights and Opportunities. On January 27, 2001, plaintiff resigned from defendants' employ.

II. DISCUSSION

Defendants move for summary judgment on the counts alleging violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.* (Count One), pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e(k) (Count Two), constructive discharge (Count Five), violation of CONN. GEN. STAT. § 46a-60(a)(7) (Count Six), violation of the Connecticut Fair Employment Practices Act ("CFEPA"), CONN. GEN. STAT. § 46a-60(a)(1) (Count Seven) and violation of CONN. GEN. STAT. § 46a-60(a)(9) (Count Nine).[2]

A. Standard

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable

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[2] Although defendants move for summary judgment on Counts Seven and Nine, there is no support argument in their memoranda for the motion. The motion is therefore denied as to Counts Seven and Nine.

inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). Determinations as to the weight to accord evidence or credibility assessments of witnesses are improper on a motion for summary judgment as such are within the sole province of the jury. *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996).

C. FMLA Claim

Defendants argue that plaintiff cannot demonstrate the denial of a substantive right or that an adverse employment actions resulted from an exercise of rights under the FMLA. Plaintiff responds that she was denied her the right to compete for open positions within defendants' organization while on pregnancy leave and as such was penalized for taking FMLA leave.

The FMLA makes it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1), or "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA. 29 U.S.C. § 2615(a)(2). An employer may not discriminate against an employee who has used FMLA leave through denial of benefits or considering the taking of leave as a negative factor in disciplinary actions. 29 C.F.R. § 825.220(c).

In the absence of evidence of direct discrimination, a claim of discrimination for taking FMLA leave is reviewed under burden shifting standard for employment discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668

(1973). *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998). Plaintiff must show that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. *Id.* Plaintiff must therefore establish a causal connection between an adverse action by defendants and her taking FMLA leave. *See Clay v. Chicago Dep't of Health*, 143 F.3d 1092, 1094 (7th Cir. 1998).

Plaintiff does not argue that defendants affirmatively denied her a promotion on the basis of her FMLA leave. Instead, plaintiff argues that defendants penalized her "by not even asking her if she wanted a position with additional responsibilities and higher pay." The position became available while plaintiff was on maternity leave, thus plaintiff never knew to apply for the position.[3] The logical implication of plaintiff's argument is that defendants were obliged under the FMLA to notify her of the availability of vacancies for which she may be qualified. Plaintiff points to no such obligation under the CBA, thus it is not apparent how such an obligation would arise.[4]

Under the burden-shifting framework, it is not enough to assert "that on several occasions

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[3] The "application process" for the "promotion" is in no way defined. While defendants characterize the position as an "assignment" rather than a "promotion," and as such would be left to managerial discretion pursuant to the CBA, plaintiff argues that there was an application process without indicating how one applied or was considered for the position. Although plaintiff argues that she had seniority to the woman ultimately assigned to the position, absent some evidence that seniority entitled her to the position and absent any evidence as to an applicable selection procedure, the only possible connection to her FMLA leave is that the position became available during her leave, thus plaintiff did not know to apply.

[4] As a general matter, plaintiff frequently refers to allegations in her complaint in her opposition to defendants' arguments. Such allegations are not "concrete evidence," and a party may not "rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[plaintiff] . . . generally requested promotion." *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998). Such would impose on an employer a responsibility "to keep track of all employees who have generally expressed an interest in promotion and consider each of them for any opening for which they are qualified but did not specifically apply." *Id.* Plaintiff's argument implies an even greater obligation than maintaining a general applicant pool, requiring instead an active duty to inquire as to whether one on leave is interested in a position. Plaintiff has provided no basis on which to establish the existence of such a duty on the part of defendants.

Plaintiff further argues that defendants' changing the attendance grade on her performance evaluation to "poor" in response to her FMLA leave constitutes an adverse employment action. Even if the factual basis for plaintiff's argument were to be accepted,[5] that defendants never in fact changed her negative grade in her performance evaluation and thereby violated the order of the grievance committee to amend the evaluation, such would not as a matter of law suffice to establish an adverse employment decision. *See Weeks v. N.Y. State Div. of Parole*, 273 F.3d 76, 86 (2d Cir. 2001); *Smart v. Ball State Univ.*, 89 F.3d 437, 442-43 (7th Cir. 1996) ("nor have we discovered . . . a single case where adverse performance ratings alone were found to constitute adverse action"). Although a combination of lesser actions may satisfy the adverse employment action requirement, *see Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001), an improper, negative grade apparently removed from plaintiff's record, by itself, will not satisfy the requirement.

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[5] In the excerpt of plaintiff's deposition provided, she appears to indicate that the evaluation containing the negative evaluation is not in her personnel file. The argument thus appears to be that she was never told that the negative grade was removed, thus the negative mark remains. How a failure to so notify her has any bearing on whether the evaluation is a part of her performance record is unclear.

In order to constitute an adverse employment action, the negative grade must have an actual, material effect on the terms and conditions of her employment, not simply a potential consequence. The action complained of as part of the prima facie case must itself be the material change, not one event which could serve as a precursor to another event that would serve as an adverse employment action. *See Weeks*, 273 F.3d at 86. Plaintiff has therefore not established a genuine issue as to an adverse action taken against her because of her taking FMLA leave.

D. Title VII Claim

Defendants argue that plaintiff was not denied an opportunity as she never expressed an interest in the position nor did she indicate she was more qualified that the officer selected. Plaintiff responds that she has provided sufficient evidence to establish a genuine issue of material fact as to whether she was denied a promotion on the basis of her pregnancy.

Plaintiff's Title VII claim is evaluated under a burden-shifting test. Plaintiff must thus establish (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment decision; and (4) that the decision took place under circumstances giving rise to an inference of discrimination. *See Austin v. Ford Models, Inc.*, 149 F.3d 148, 152 (2d Cir. 1998).

As with the FMLA claim, plaintiff fails to establish that she ever expressed an interest in the positions she was allegedly denied as a result of her pregnancy. *See Brown*, 163 F.3d at 710; *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 n.13 (8th Cir. 1996). Contrary to plaintiff's argument, plaintiff must identify a basis on which to require defendants to notify her of an open position in her absence. Such a duty will not be imposed based on the conjecture that defendants should have been aware that "had [plaintiff] known of the position she would have expressed interest." Pl.'s Mem. at 19.

Plaintiff further argues that defendants' denying her an assignment to a special community police unit after her return to full duty following FMLA leave constitutes an adverse action and a basis for a claim of pregnancy discrimination. Plaintiff in no way ties the two events, instead alleging, as she was not pregnant at the time, that she was "a working mother with two children." Such an allegation does not implicate discrimination "of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k); *see Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) ("childrearing [is not a] condition[] within the scope of" 42 U.S.C. § 2000e(k)).[6] Plaintiff therefore cannot establish a prima facie case of discrimination on the basis of her pregnancy.

E. Constructive Discharge

Defendants argue that summary judgment should be granted on plaintiff's count alleging constructive discharge because it is duplicative of Count Four and it represents an unauthorized common law cause of action when a statutory cause of action exists. Plaintiff responds that she has properly alleged alternative theories and is entitled to bring a common law cause of action for wrongful discharge.

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[6] The Pregnancy Discrimination Act, codified at 42 U.S.C. § 2000e(k), is not a basis for claim independent of Title VII's prohibition against gender discrimination. The Act is a definitional amendment in response to *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), in which the Supreme Court held that pregnancy discrimination was not gender discrimination. The Act thus amended Title VII to expressly include discrimination on the basis of pregnancy within the prohibition against gender discrimination. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). The claim is treated separately from plaintiff's Title VII gender discrimination claim but is in fact a separate count alleging a second Title VII gender discrimination claim. Judgment on this Count in no way reflects deficiencies in the separate gender discrimination claim.

Count V, entitled "Constructive Discharge," is a damages claim as a consequence of defendants' forcing her to resign for filing a grievance. Count IV is a retaliatory discharge claim, alleging that plaintiff was subjected "to hostility and retaliatory treatment in her work environment." Both claims allege violations of Title VII, 42 U.S.C. § 2000e-3(a).

Plaintiff argues that summary judgment is improper because "the damages awarded by a jury would not be the same for a Retaliation claim as they would be in a Constructive Discharge claim." Plaintiff misapprehends the nature of constructive discharge. As an initial matter, "constructive discharge" is not an independent cause of action entitling plaintiff to an enhanced award of damages. It is a finding that satisfies the requirement of an adverse employment action for purposes of an employment discrimination claim, *see Fitzgerald v. Henderson*, 251 F.3d 345, 357-58 (2d Cir. 2001), or a discharge for purposes of a wrongful discharge claim, *see Seery v. Yale-New Haven Hosp.*, 17 Conn. App. 532, 540, 554 A.2d 757 (1989).

Such a finding does not implicate a claim for wrongful discharge, nor do plaintiff's allegation put defendants on notice of such a claim. Count Five alleges a discharge "in violation of" Title VII, not a discharge in violation of a public policy implicated by the statute.[7] *See id.* As plaintiff nowhere mentions a public policy violated by defendants' actions, plaintiff alleges a violation of Title VII, not a wrongful discharge claim.

Although plaintiff alleges violations of Title VII in both Counts Four and Five, the former for

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[7] The recent decision of *Thibodeau v. Design Group One Architects*, LLC, 260 Conn. 691, 694, 802 A.2d 731 (2002), would raise serious questions as to whether an alleged termination because of a plaintiff's pregnancy implicates a public policy as is necessary for a wrongful discharge claim. The question need not be resolved here as the allegations within Count Five do not suffice to put plaintiff on notice of such a claim pursuant to FED. R. CIV. P. 8(a)(2).

retaliatory acts, the latter constructive discharge, such is not a legal basis for dismissing or granting summary judgment on Count Five. It would not appear improper to allege retaliatory acts falling short of a constructive discharge, in addition to the constructive discharge itself. The counts are not necessarily duplicative.

F. Violation of CONN. GEN. STAT. § 46a-60(a)(7)

Defendants argue that plaintiff has failed to establish that she was denied compensation or benefits because of her pregnancy. Plaintiff responds that there are genuine issues as to whether she was denied compensation because of her pregnancy.

CONN. GEN. STAT. § 46a-60(a)(7) provides in relevant part that it shall be a discriminatory practice

> (C) to deny to that employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer; . . . or (G) to fail or refuse to inform employees of the employer, by any reasonable means, that they must give written notice of their pregnancy in order to be eligible for transfer to a temporary position . . .

Plaintiff's argument in opposition is limited to the above subsections. Notwithstanding the apparent concession as to the inapplicability of the remaining subsections, they appear to have little applicability to the present case.

However, the cited subsections, *see* Pl.'s Mem. at 21, by their express terms, cannot be construed as applying to plaintiff's arguments. CONN. GEN. STAT. § 46a-60(a)(7)(C) applies to the denial of compensation through disability or leave benefits accrued during pregnancy disability. Such would not, by its terms, apply to benefits denied after the period of disability or to an alleged denial of a

promotion, which is neither a disability nor a leave benefit.

CONN. GEN. STAT. § 46a-60(a)(7)(G) is a separate matter. Plaintiff argues that the subsection requires defendants "to inform [plaintiff] how she could have notified [defendants] of her pregnancy and thus afforded her certain opportunities." Such is not within the plain meaning of the subsection. The subsection provides that it is a discriminatory practice for an employer to consider a pregnant employee ineligible for a transfer to a temporary position for failure to provide written notice of pregnancy unless the employer has first informed the employee of such requirement. Additionally, plaintiff herself stated that it was a full-time position, not a temporary position. *See* Pl.'s Dep. at 36.

Notwithstanding the apparent inapplicability of the subsections recited in her brief, construing the claim as generically invoking CFEPA's prohibition against discrimination because of or as a result of a pregnancy, the claim will fail for the same reasons set forth in Part II.D. Connecticut law reviews a claim under the same test as applied in Title VII claims. *See Craine v. Trinity Coll.*, 259 Conn. 625, 637, 791 A.2d 518 (2002). The result is thus the same whether claiming a violation of Title VII or a violation of CFEPA.

III. CONCLUSION

Defendants' motion for summary judgment (Docs. 85 and 93) is **granted** as to Counts One, Two and Six, but is **denied** as to Counts Five, Seven and Nine.

SO ORDERED.

Dated at New Haven, Connecticut, December ___, 2002.

Peter C. Dorsey
United States District Judge